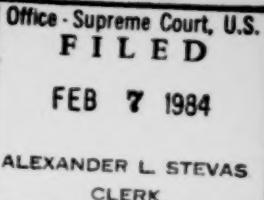


**83-1319**

NO. \_\_\_\_\_



IN THE  
SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_, Term 19\_\_\_\_

ANTHONY J. GARAFOLA,

Petitioner

vs.

G. C. WILKINSON, WARDEN  
G. C. WILKINSON,

Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT

---

John M. Humphrey, Esquire  
MURPHY, MUSSINA, HARRIS, TRAVIS,  
RIEDERS and HUMPHREY  
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QUESTION PRESENTED FOR REVIEW

Whether the United States Parole Commission acted within its statutory authority when it promulgated Rules under which a federal prisoner who has been paroled to a state detainer, upon subsequent conviction for a crime punishable by imprisonment, committed while subject to the jurisdiction of the Commission, can be denied credit in the calculation of his parole-violation term for the time that he was incarcerated in a state prison pursuant to the state detainer.

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OFFICIAL AND UNOFFICIAL  
REPORTS OF OPINIONS

The Opinion of the Court of Appeals for the Third Circuit, dated November 15, 1983, is set forth in the Appendix. The February 2, 1983 Opinion of the United States District Court for the Middle District of Pennsylvania is included in the Appendix, and is officially reported at 555 F.Supp. 1002 (M.D.Pa. 1983).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on November 15, 1983. Thereafter, on December 9, 1983, the Court of Appeals for the Third Circuit denied Petitioner's Petition for Rehearing. This Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES  
WHICH THE CASE INVOLVES

This case generally involves the Parole Commission and Reorganization Act of 1976, 18 U.S.C. §4201 et seq., but does not involve the interpretation of any specific section of that statute.

This case does involve the validity of portions of 28 C.F.R. §2.32 (1976), the relevant portions of which read as follows:

§2.32 Parole to Local or Immigration Detainers

(a) When a state or local detainer is outstanding against a prisoner whom the Commission wishes to parole, the Commission may order either of the following:

(1) "Parole to the actual physical custody of the detaining authorities." In this event, release is not to be effected except to the detainer. When such a detainer is withdrawn, the prisoner is not to be released unless and until the Commission makes a new order of parole.

(2) "Paroled to the actual physical custody of the detaining authorities or an approved plan." In this event, release is to be effected even though the detainer might be withdrawn, providing there is an acceptable plan for community supervision.

...

(c) As used in this section "parole to a detainer" means release to the "physical custody" of the authorities who have lodged the detainer. Temporary detention in a jail in the county where the institution of confinement is located does not constitute release on parole to such detainer. If the authorities who lodged the detainer do not take the prisoner into custody for any reason, he shall be returned to the institution to await further order of the Commission.

STATEMENT OF THE CASE

On October 8, 1974, Petitioner Anthony J. Garafola received a six (6) year federal sentence for conspiracy and disposing of falsely made and forged securities in interstate commerce. On June 2, 1976, Garafola had his initial parole hearing at which time the Parole Commission was advised that Garafola had been convicted in New Jersey for assault and battery and had received a one to three year sentence to run concurrently with the federal sentence. The Commission ordered that Garafola be paroled "effective August 19, 1976 to the actual physical custody of the New Jersey authorities; however, if the New Jersey detainer is withdrawn, parole effective September 7, 1976, via Community Treatment Center."

On August 19, 1976, Garafola was paroled from the federal sentence to the New Jersey detainer with 1,452 days remaining to be

served on his federal sentence. The New Jersey detainer was executed and after serving 509 days in a New Jersey State Prison, Garafola was released by New Jersey on January 10, 1978. At that time he became subject to active supervision under his federal parole with 943 days remaining to be served on said parole.

On March 18, 1980, Garafola was convicted in a New Jersey state court of conspiracy for criminal acts committed in September, 1977 while Garafola was in the New Jersey State Prison. On April 14, 1980, he was sentenced to two years and 11 months imprisonment on this conspiracy conviction. On April 23, 1980, the Parole Commission issued a parole violation warrant against Garafola based upon the new conviction, and this warrant was lodged as a detainer against Garafola with the New Jersey State Prison authorities.

Following a hearing, on September 24, 1981 the Commission revoked Garafola's parole and ordered that he forfeit all time he had spent on parole, that he begin his parole violation term on his release from state custody, and that he be denied re-parole on the parole violation term. The Commission found that August 19, 1976 was the date that Garafola was paroled from his federal sentence and thus computed the parole violation term to be 1,452 days. Garafola was released from the New Jersey conspiracy sentence on October 27, 1981, at which time the federal parole violation warrant was executed and his federal parole violation term of 1,452 days began.

Garafola filed a Petition for Writ of Habeas Corpus under 28 U.S.C. §2241 in the United States District Court for the Middle District of Pennsylvania, which Petition requested credit towards the federal parole violation term for the time he had spent in

custody pursuant to the state sentence to which he had been paroled in August, 1976, and from which he was released on January 10, 1978.

By Opinion dated February 2, 1983, the District Court granted habeas corpus relief holding that the parole to the state sentence was not a "parole", and therefore the Commission could not deny Garafola credit for time spent in state prison pursuant to a state detainer. By Order dated March 3, 1983 (Appendix) the District Court ordered the Commission to credit Garafola for the time he spent in state prison from August 19, 1976 to January 10, 1978. On appeal, the Court of Appeals for the Third Circuit concluded that parole of a federal prisoner pursuant to 28 C.F.R. §2.32(a)(2) (1982) is a "parole" within the meaning of the Parole Act, that this regulation was valid, and that the Commission acted within its discretion when

it revoked Garafola's federal parole and required him to serve the full amount of time remaining on his federal sentence on the date he was paroled from federal prison, (i.e., 1,453 days).

REASONS FOR GRANTING THE WRIT

The Parole Commission, pursuant to 18 U.S.C. §4210(b)(2) (1976), may revoke the parole of any federal parolee who is convicted of any new criminal offense punishable by imprisonment, and may order that the parolee receive no credit towards time served from the date he was released on parole until he returns to federal custody following the completion of any new sentence. Pursuant to the authority granted it in 18 U.S.C. §4203(a)(1) (1976), the Parole Commission promulgated regulations having the effect of making "parole to a state detainer" one form of "parole". 28 C.F.R. §2.32 (1982). As correctly noted by the Court of Appeals for the Third Circuit, "the real question in this case is whether these regulations are valid". If the regulations are invalid, the Commission cannot deny Garafola credit for time spent in state

prison because he was not then on parole.

The Parole Act, 18 U.S.C. §4201 et seq., does not specifically define the term "parole". However, in another context, Congress has defined "parole" as follows:

"'Parole' means any form of release of an offender from imprisonment to the community by a releasing authority prior to the expiration of his sentence, subject to conditions imposed by the releasing authority and to its supervision ..."

18 U.S.C. §4101(f). Indeed, parole has always been defined as the release of a prisoner from confinement to the community, subject to certain limitations and conditions. See, e.g., Morrissey v. Brewer, 408 U.S. 471, 477, 92 F.Ct. 2593, 2598 (1972) ("The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence."); DeCosta v. United States District Court, 445 F.Supp. 989, 991 (D.Minn.

1978); United States ex rel. O'Connor v. MacDonald, 449 F.Supp. 291, 295 (N.D.Ill. 1978).

The structure and legislative history of the Parole Act make it clear that "release on parole" means release to the community. Thus, the House Conference Report discussing the factors to be considered in making parole decisions, declared:

"The parole authority must also take into account whether or not continuing incarceration of an offender will serve a worthwhile purpose. Incarceration is the most expensive of all the alternative types of sentences available to the criminal justice system, as well as the most corrosive because it can destroy whatever family and community ties an offender may have which would be the foundation of his eventual return as a law-abiding citizen."

House Conference Report No. 94-388, U.S. Code Cong. & Admin. News 1976, p. 352. The structure of the Act offers additional evidence that Congress intended the phrase "release on parole" to mean release to a

community setting. 18 U.S.C. §4206 provides that among the criteria to be considered in determining whether to release a prisoner on parole are "that release would not jeopardize the public welfare." The legislative history explains that:

"The use of the phrase 'release would not jeopardize the public welfare,' is intended by the Conferencees to recognize the incapacitative aspect of the use of imprisonment which has the effect of denying the opportunity for future criminality at least for a time."

House Conference Report No. 94-388, U.S. Code Cong. & Admin. News 1976, p. 358.

In 18 U.S.C. §4209, Congress required the Parole Commission to impose such conditions of parole that are reasonably related to "(1) the nature and circumstances of the offense; (2) the history and characteristics of the parolee; and may provide for such supervision and other limitations as are reasonable to protect the public welfare." While 18 U.S.C. §4209(c)

recognizes the propriety of a condition of parole that a parolee reside in a residential community treatment center for all or a part of the period of parole, there is no recognition in the statute of parole to a detainer with consequential further incarceration in a prison setting. With respect to appropriate conditions of parole, the House Conference Report states:

"The Commission may impose or modify any other condition of parole only to the extent that there is a reasonable relationship between such conditions and the nature and circumstances of the offense and the history and characteristics of the parolee, except that, the Commission may impose conditions of parole that limit the parolee's liberty short of incarceration if in the Commission's judgment such conditions are reasonably necessary to protect the public welfare."

House Conference Report No. 94-388 U.S. Code Cong. & Admin. News 1976, p. 363 (emphasis supplied).

Thus, the case law definition of the term and the entire structure of the Parole Act indicate that parole is a period of community release, under supervision, for the purpose of determining whether the parolee can adjust to life outside of the penal system, with the option for revocation if he is incapable of doing so. Release to the "actual physical custody" of a detainer is quite different in that it involves the imposition of incarceration which is antithetical to "parole".

Although Petitioner herein does not have statistics on the question, it is submitted that federal prisoners are frequently paroled to the actual physical custody of a detainer. Therefore, within the meaning of Rule 17(c) of the Supreme Court Rules, the issue here involved is an important question of federal law which should be settled by this Court.

CONCLUSIONS

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

MURPHY, MUSSINA, HARRIS, TRAVIS,  
RIEDERS & HUMPHREY

---

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(B8420015)

CERTIFICATE OF SERVICE

AND NOW comes John M. Humphrey, Attorney for Petitioner, and certifies that a copy of the attached Petition for Writ of Certiorari has been served upon Henry J. Sadowski, United States Parole Commission, Scott Plaza II, 6th Floor, Industrial Highway, Philadelphia, PA 19113 this 7<sup>th</sup> day of February, 1984 by first class mail, postage prepaid.

MURPHY, MUSSINA, HARRIS,  
TRAVIS, RIEDERS & HUMPHREY

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UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ANTHONY J. GARAFOLA, :  
Petitioner : CIVIL NO. 82-0977  
vs. : Complaint Filed  
: 8/12/82  
G. C. WILKINSON, : (Judge Muir)  
Warden, :  
Respondent :  
:

OPINION

MUIR, District Judge.

Petitioner Anthony J. Garafola, presently incarcerated at the Lewisburg Penitentiary, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. §2241 on August 12, 1982. On September 10, 1982, United States Magistrate Joseph F. Cimini issued a Rule to Show Cause. On November 12, 1982, Garafola filed a traverse to the answer. On December 30, 1982, Magistrate Cimini filed his report recommending that the petition for a writ of habeas corpus be denied. The period for filing exceptions to the Magistrate's Report ended on January 12,

1983. Garafola filed exceptions on January 18, 1983. Because the delay is slight and might well have resulted from Garafola's incarceration, the Court will consider Garafola's exceptions. The matter is now ripe for disposition by this Court.

Garafola was convicted in the United States District Court for the District of Massachusetts of a variety of offenses, including one count of conspiracy and eight counts of securities-related fraud on October 8, 1974. Garafola was sentenced to be incarcerated for a total of six years. Garafola was afforded his initial parole hearing on June 2, 1976. At that time, the Parole Commission learned that Garafola had a concurrent one-year to three-year New Jersey state sentence for assault and battery. Garafola was released by federal authorities on "parole" on August 19, 1976. Because there was an outstanding New Jersey state

detainer on the state sentence, Garafola's release was to the custody of the New Jersey authorities. As of August 19, 1976, Garafola had a total of 1,452 days remaining to be served on his federal sentence and his full-term expiration date was August 10, 1980. Garafola was released by New Jersey authorities on parole on January 10, 1978. In 1980, Garafola was again arrested and subsequently convicted on March 18, 1980 of New Jersey state conspiracy-related charges. On April 14, 1980, Garafola was sentenced in New Jersey state court for conspiracy to a term of almost three years imprisonment.

As a result of the state conspiracy conviction and sentence in New Jersey, on April 23, 1980, a federal parole violator warrant was issued against Garafola. On September 24, 1981, Garafola's federal "parole" was revoked. Garafola was advised that none of the time he had spent on federal "parole" (i.e. since August 19, 1976) was to

be credited and that the parole violator term would commence upon the termination of his New Jersey state incarceration for the conspiracy offense. The New Jersey incarceration ended on October 27, 1981. Garafola was directed by the Parole Commission to continue his federal sentence to expiration, for a total of 1,452 days from October 27, 1981.

In this habeas corpus petition, Garafola contends that the time he served in the New Jersey state prison system from August 19, 1976 until January 10, 1978 should be credited against the 1,452 days which remained on his federal sentence when he was released "on parole" on August 19, 1976. In his report, the Magistrate concluded that because Garafola was on "parole" and because violation of "parole" may properly result in denial of credit for all time served while on "parole", Garafola is not entitled to the

relief sought. In the view of the Magistrate, the fact that Garafola, while on federal "parole," was incarcerated in the New Jersey state system rather than being "on the streets" has no legal consequence. Clay vs. Henderson, 524 F.2d 921 (5th Cir. 1975).

This Court does not agree. In the ordinary case where parole is revoked for a violation thereof the time spent on parole is not credited on the time remaining to be served on the federal sentence. Under pre-1976 law, it was clear that a parole violator could lose both good time credits and credit for time spent on conditional release where parole was revoked. See 18 U.S.C. §4205 (1969), modified by Parole Commission and Reorganization Act of 1976, P.L. 94-233, §2, March 15, 1976, 90 Stat. 222. ("The unexpired time of imprisonment of any [prisoner whose parole has been revoked] shall begin to run from the date he is returned to the custody of the Attorney

General...and the time the prisoner was on parole shall not diminish the time he was sentenced to serve"); Coronado vs. United States Board of Parole, 540 F.2d 216, 218 (5th Cir. 1976). See also 18 U.S.C. §4207 (1969), modified by Parole Commission and Reorganization Act of 1976, P.L. 94-233, §2, March 15, 1976, 90 Stat. 224 ("If...parole shall be revoked and the parole so terminated, the...prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced.") New sections 4213 and 4214 include no similar forfeiture provisions. 18 U.S.C. §4213, 4214. Nonetheless, absent legislative indication to the contrary, this Court is of the opinion that the Parole Commission retains the right to require a parole violator to serve the entire remaining portion of his term of incarceration. Lambert vs. Warden, United States

Penitentiary, 591 F.2d 4, 8 (5th Cir. 1979).

Cf. Patton vs. Fenton, 491 F.Supp. 156 (M.D.Pa. 1979) (Nealon, C.J.).

Release to a detainer is not, however, an ordinary circumstance of "parole". Indeed, calling such release "parole" is pure hyperbole and a gross twisting of the concept. Release on parole usually results in a termination of the prisoner's period of incarceration. The parolee lives in a community or other less intrusive setting under the supervision of appropriate authorities. E.g. 28 C.F.R. §2.38. While the parolee is subject to a variety of "conditions of release," 28 C.F.R. §2.40, he has substantial freedom to adjust to the non-prison environment.

The difference between "parole" to a detainer and ordinary parole is demonstrated by the existence of a separate statement of policy of the Parole Commission regarding parole to a detainer. 28 C.F.R. §2.31.

Furthermore, clearly, the same rules applicable to ordinary parole cannot apply to "parole" to a detainer. Among the express conditions of release are that a parolee shall not "associate with persons engaged in criminal activity...", 28 C.F.R. §240(a)(10). By definition, where a "parole" is to a detainer the "parolee" will probably be incarcerated in circumstances where he will be associating with persons with criminal records. Such association would, by ordinary parole standards, constitute a violation of the conditions of release. 28 C.F.R. §2.40. Additional evidence of the distinction between ordinary parole and "parole" to a detainer is that under Parole Commission regulations, once Garafola was "paroled" to a detainer to the physical custody of the New Jersey authorities, withdrawal of that detainer did not automatically result in Garafola's release. Indeed, the regulations

require that "when such a detainer is withdrawn, the prisoner is not to be released unless and until the Commission makes a new order of parole." 28 C.F.R. §2.329(a)(1). In essence, the Parole Commission is given unbridled discretion upon the inmate's release from state custody to consider the matter de novo. For all of these reasons, this Court is of the opinion that a "parole" to a detainer is not parole at all. Therefore, the Court must consider whether the forfeiture of credit provisions for revocation of ordinary parole should apply.

There is little case law on the question. The sole case which the parties cite addressing this issue is Clay vs. Henderson, 524 F.2d 921 (5th Cir. 1975), which was decided before the Parole Commission Reorganization Act of 1976. Furthermore, the parole Commission's otherwise exhaustive regulations do not set forth a policy on the effect of "parole" to a

detainer in this circumstance.

Had Garafola not been paroled on August 19, 1976 and, instead, had he been transferred to New Jersey authorities for the detainer, the time Garafola served in the New Jersey state prison system from August 19, 1976 to January 10, 1978 would be "credited" toward Garafola's ultimate federal release date. Cf. 18 U.S.C. §3568 (credit must be given "for any days spent in custody in connection with the offense or acts for which sentence was imposed") 18 U.S.C. §4085; 28 C.F.R. §527.30 (transfer of inmates to state agents for production on state writs). Were the Court to find that Garafola's "parole" to a state detainer does not result in the granting of "credit" for the time served in the state system, the absurd situation would result whereby Garafola was, in effect, penalized by being paroled because the concurrent state sentence would be converted

to an add-on sentence by the "parole". This "penalty" resulting from parole is arbitrary and not justified by the legislative history of the Parole reorganization Act of 1976, the statute itself, or Parole Commission regulations. Furthermore, no holding in this Circuit dictates that result.

For all of the foregoing reasons, the Parole Commission will be directed to recompute Garafola's ultimate release date by granting Garafola credit for the time served in the New Jersey state prison system from August 19, 1976 to January 10, 1978.

Garafola also asserts that the time from March of 1980 (when he was convicted in New Jersey on conspiracy charges) to October of 1981 (when he was finally taken in federal custody as a parole violator) should be credited against the time remaining on his federal sentence. The Magistrate rejected this request for credit. Garafola apparently does not except to this conclusion

in the Magistrate's Report. For the reasons stated at pages 11-13 of the Magistrate's Report, Garafola's request for credit on his federal sentence for the time from March of 1980 to October of 1981 will be denied. See, e.g., 18 U.S.C. §3568; U.S. vs. Perno, 605 F.2d 432 (9th Cir. 1979); Polakoff vs. U.S., 489 F.2d 727 (5th Cir. 1974). Cf. U.S. vs. Campisi, 622 F.2d 697 (3d Cir. 1980).

An appropriate order will be entered.

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MUIR, U.S. District Judge

DATED: February 2, 1983

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ANTHONY J. GARAFOLA, :  
Petitioner : CIVIL NO. 82-0977  
vs. : Complaint Filed  
: 8/12/82  
G. C. WILKINSON, :  
Warden, : (Judge Muir)  
: Respondent :  
:

ORDER

1. The Parole Commission shall recompute Garafola's release date, giving Garafola credit on his federal sentence for the time period from August 19, 1976 to October 10, 1978 when Garafola was incarcerated in the New Jersey prison system.

2. Garafola's request for credit for the time period from March of 1980 to October of 1981 is denied.

3. The Clerk of Court shall send a copy of this order to Magistrate Cimini.

4. The Clerk of Court shall close this  
file.

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MUIR, U.S. District Judge

DATED: February 2, 1983

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ANTHONY J. GARAFOLA, :  
Petitioner : CIVIL NO. 82-0977  
vs. : Complaint Filed  
: 8/12/82  
: G. C. WILKINSON, : (Judge Muir)  
Warden, :  
: Respondent :  
:

ORDER  
March 3, 1983

THE BACKGROUND OF THIS ORDER IS AS  
FOLLOWS:

On February 2, 1983, this Court issued an opinion and order regarding Garafola's request for habeas corpus relief. Paragraph 1 of the Order stated in error that the Parole Commission was to recompute Garafola's release date giving him credit for time served from August 19, 1976 to October 10, 1978. It is the purpose of this order to correct an error in Paragraph 1 of the Order of February 2, 1983.

NOW, THEREFORE, IT IS ORDERED THAT:

Paragraph 1 of this Court's order of February 2, 1983 is amended to read as follows:

1. The Parole Commission shall recompute Garafola's release date, giving Garafola credit on his federal sentence for the time period from August 19, 1976 to January 10, 1978 when Garafola was Incarcerated in the New Jersey Prison System.

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MUIR, U.S. District Judge

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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NO. 83-3175

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ANTHONY J. GARAFOLA,

Appellee

v.

G.C. WILKINSON, Warden

G.C. Wilkinson,

Appellant

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On Appeal from the United States District  
Court for the Middle District of Pennsylvania

(D.C. Civ. No. 82-977)

Argued September 29, 1983

Before: ALDISERT and BECKER, Circuit Judges  
and COHILL,\* District Judge  
(Filed November 15, 1983)

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Lewisburg Prison Project  
Post Office Box 128  
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Attorney for Appellee

DAVID DART QUEEN  
United States Attorney  
JAMES W. WALKER  
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P.O. Building, Room 416  
Scranton, PA 18501

---

\*Honorable Maurice B. Cohill, Jr.,  
United States District Judge for the Western  
District of Pennsylvania, sitting by  
designation.

HENRY J. SADOWSKI (Argued)  
Regional Counsel  
U.S. Parole Commission  
Scott Plaza II, Sixth Floor  
Industrial Highway  
Philadelphia, PA 19113  
Attorneys for Appellant

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OPINION OF THE COURT

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BECKER, Circuit Judge,

This appeal presents the question whether the United States Parole Commission acted within its statutory authority when it promulgated a rule under which a federal prisoner who has been paroled to a state detainer, upon subsequent conviction for a crime punishable by imprisonment, committed while subject to the jurisdiction of the Commission, can be denied credit in the calculation of his parole-violation term for the time that he was incarcerated in state prison pursuant to the state detainer. The case turns on whether a "parole to a state detainer" is a "parole" within the meaning of

the Parole Commission Reorganization Act, 18 U.S.C. §§4201-4218 (1976) ("Parole Act").

The district court held that a prisoner is "paroled" only when he is released into the community, that a parole to a state detainer was the equivalent of a transfer to state custody, and therefore that the time spent by appellee Anthony J. Garafola in state prison after being paroled to the state detainer must be credited towards satisfaction of his federal sentence. Because we hold that a "parole to a state detainer" made pursuant to section 2.32(a)(2) of the Parole Commissions' regulations, see 28 C.F.R. §§2.1-2.60 (1982), is a "parole" within the meaning of the Parole Act, we reverse.

I.

On October 8, 1974, Garafola was sentenced in the United States District Court for the District of Massachusetts to a total regular adult term of six-years imprisonment

on convictions of one count of conspiracy and eight counts of disposing of falsely made and forged securities in interstate commerce. On June 2, 1976, Garafola had his initial parole hearing. At this hearing, the Parole Commission was advised that Garafola had been convicted in New Jersey for assault and battery and had received a one- to three-year sentence, to run concurrently with his federal sentence. The Commission decided to parole Garafola "effective August 19, 1976 to the actual physical custody of the New Jersey authorities; however, if the New Jersey detainer is withdrawn, parole effective September 7, 1976, via Community Treatment Center."

On August 19, 1976, pursuant to this decision, Garafola was paroled from his six-year federal sentence to the New Jersey detainer; at that time 1452 days remained to be served on his federal sentence. On

January 10, 1978, after 509 days in a New Jersey state prison, Garafola was released by the State of New Jersey from his one- to three-year state sentence, and he became subject to active supervision under his federal parole; on that date 943 days remained to be served on his federal parole.

On March 18, 1980, Garafola was convicted in a New Jersey state court of conspiracy. The criminal acts committed by Garafola that resulted in this conspiracy conviction occurred in September 1977, while Garafola was still in custody on his state sentence. On April 14, 1980, Garafola was sentenced to two years and eleven months imprisonment on this conspiracy conviction. On April 23, 1980, the Commission issued a parole violation warrant against Garafola, based upon his new conviction. This warrant was lodged as a detainer against Garafola with the New Jersey State prison authorities.

After conducting a hearing, the Commission decided, by notice of action dated September 24, 1981, to revoke Garafola's parole, to forfeit all time he had spent on parole, to begin his parole violation term on his release from state custody, and to deny him reparole on the parole violation term. The Commission found that August 19, 1976, was the date that Garafola was paroled from his federal sentence and thus computed the parole violation term to be 1452 days. On October 27, 1981, Garafola was released from his new state sentence, at which time the federal parole violation warrant was executed. The federal parole violation term of 1452 days began to run on that date.

On August 12, 1982, Garafola, acting pro se, petitioned in the District Court for the Middle District of Pennsylvania under 28 U.S.C. §2441 (1976), for a writ of habeas corpus against his custodian George C. Wilkinson, Warden of United States

Penitentiary, Lewisburg, Pennsylvania. Garafola requested credit towards the federal parole violation term for the time he had spent in custody pursuant to the state sentence to which he had been paroled in August 1976, and from which he was released on January 10, 1978.

On February 2, 1983, the district court granted Garafola's petition for a writ of habeas corpus. The district court held that the "parole to the state sentence" was not a "parole", and that therefore, the Commission could not deny a federal prisoner credit for time spent in state prison pursuant to a state detainer. The court ordered the Commission to credit Garafola for the time that he spent in state prison from August 19, 1976, to January 10, 1978. Garafola v. Wilkinson, 555 F.Supp. 1002 (M.D.Pa. 1983)<sup>1</sup>

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l. In its brief the Commission informs us that it has complied with the district court's order but reserves the right to void

The Parole Commission has express statutory authority to revoke the parole of any parolee who is convicted of any new criminal offense punishable by imprisonment, and to order that that individual receive no credit towards time served from the date he was released on parole until he returns to federal custody following completion of any

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the credit if we reverse. The Commission has calculated a new full term release date for Garafola of May 26, 1984, and a new statutory mandatory release date (i.e., his full term less good-time deductions) of September 21, 1983. Thus presumably Garafola was released on September 21, 1983 "as if released on parole." 18 U.S.C. §4164 (1976). Assuming that Garafola has committed no new parole violations this period of new parole will expire one hundred and eighty days prior to May 26, 1984 (i.e., Nov. 27, 1983). Id. The Commissioner's good-faith compliance with the district court's order does not render this case moot. See U.S. Ex. Rel. Forman v. McCall, 709 F.2d 852, 855-56 n.9 (3d.Cir. 1983); Campbell v. U.S. Parole Comm'n, 704 F.2d 106, 109 n.2 (3d.Cir. 1983).

new sentence of incarceration. 18 U.S.C. §4210(b)(2)(1976).<sup>2</sup> The term "parole" is not defined in the Parole Act;<sup>3</sup> however, this

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2. The subsection reads:

(2) in the case of a parolee who has been convicted of a Federal, State or local crime committed subsequent to his release on parole, and such crime is punishable by a term of imprisonment, detention or incarceration in any penal facility, the Commission shall determine, in accordance with the provisions of section 4214(b) or (c), whether all or any part of the unexpired term being served at the time of parole shall run concurrently or consecutively with the sentence imposed for the new offense, but in no case shall such service together with such time as the parolee has previously served in connection with the offense for which he was paroled, be longer than the maximum term for which he was sentenced in connection with such offense.

18 U.S.C. §4210(b)(2) (1976) (emphasis added); See 28 C.F.R. §§2.47(d)(2); H. Conf. R. No. 838, 94th Cong., 2d Sess. 19 reprinted in 1975 U.S. Code Cong. & Ad. News 351, 364; United States v. Newton, 698 F.2d 770 (5th Cir. 1983); Harris v. Day, 649 F.2d 755, 758-60 (10th Cir. 1981). See also 28 C.F.R. §2.10.

3. Appellee points to the definition of "parole" in 18 U.S.C. §4104(g) (Supp. II 1978) ("parole" is "any form of release of an offender from imprisonment to the community")

omission is not surprising given that the subject of the Parole Act is parole, and Congress clearly intended to define that term by reference to the structure and substance of the entire Act. Nor is there any express definition in the regulations promulgated by the Parole Commission pursuant to its express statutory authority to promulgate regulations to implement the goals of the Parole Act. However, the Commission has promulgated regulations that have the effect of making "parole" to a "statute detainer" one form of "parole".<sup>4</sup> The real question in this case

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as support for his conclusion that "parole" requires that the prisoner must be released to the community, not to another prison. However, §4101(q) is part of chapter 306 ("Transfer to or from Foreign Countries") and is limited by its express terms to that chapter ("§4101 Definitions. As used in this chapter the term ---- (f) 'Parole' means own list of definitions in §4201, and "parole" is not included.

4. The Parole Commission has express statutory authority to promulgate regulations to implement the Parole Act. 18 U.S.C. §4203(a)(1) (1976). Pursuant to this

then is whether these regulations are valid.

If we determine that the regulations are valid, then Garafola was "paroled" when he was "paroled to the state detainer" on August 19, 1976, and upon his subsequent conviction and revocation of his parole, he is liable to serve the full amount of time that remained on his federal sentence calculated from the day he was paroled (i.e., 1452 days). If,

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authority the Commission has promulgated regulations at 28 C.F.R. §§2.1-2.60. Although the regulations contain a section of definitions (section 2.1), the term "parole" is not defined. The regulations, however, do address parole where a detainer has been lodged against a federal prisoner. 28 C.F.R. §2.32(c) (1982) ("As used in this section 'parole to a detainer' means release to the 'physical custody' of the authorities who have lodged the detainer.") First, the regulations provide that the existence of a detainer, by itself, is not sufficient justification to deny parole where a prisoner otherwise meets the parole criteria. 28 C.F.R. §2.31(a) (1982). Second, the regulations provide for two types of parole where a detainer is outstanding; parole to the detaining authority with the proviso that the prisoner be returned to the Federal authorities once the detainer is withdrawn; and parole to the detaining authorities, but

however, the regulations are invalid, then Garafola was not a "parolee" while he was in state prison, and the Commission had no authority to deny credit to Garafola for the time he spent in state prison.<sup>5</sup>

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once the detainer is withdrawn, parole to the community. 28 C.F.R. §2.32(a)(1) & (2) (1982). Plainly then, the Parole Commission has promulgated regulations that make a "parole to a detainer" one form of "parole". Thus, whatever the "ultimate essence" of parole is, by dint of these regulations "parole" includes "parole to a state detainer."

5. The typical context in which the problem of credit for time served in state prison will arise, is where a prisoner is paroled to a state detainer, serves his time in state prison, and is released to active supervision under his federal parole and then, while free but still on federal parole, the parolee commits some new crime. In this situation the Commission clearly has statutory authority to revoke the parole and require the parolee to serve his entire term, calculated at least from the day he was released from state prison. The only issue in this hypothesized case would be whether the parolee could be required to serve time calculated from the date he was released from federal prison: that is, whether the time spent in state prison was as a federal parolee (in which case denial of credit is permissible) or as a federal prisoner (in which case denial of credit is not permissible).

At the threshold, we note that Congress has committed substantive parole determinations to the absolute discretion of the Parole Commission.<sup>6</sup> This statutory restriction on judicial review does not

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Garafola's situation is more problematic because he committed his new crime while in state prison. If the Commission's regulations are invalid, then Garafola was not a parolee while he was in state prison. The Parole Commission only has authority to deny credit for time spent on parole where the parolee commits a crime while on parole. 18 U.S.C. §4210(b)(2) (1976). Thus, in Garafola's case, assuming the regulations are invalid, the Commission not only cannot deny credit for time spent in state prison because Garafola was not then on parole, but also the Commission cannot deny credit for the time after Garafola was released from state prison because, even supposing he became a federal parolee upon his release from state prison, he committed no crime while on parole.

6. 18 U.S.C. §4218(d) (1976); see Portley v. Grossman, 444 U.S. 1311 (1980); Garcia v. Neagle, 660 F.2d 983, 988 (4th Cir. 1981), cert. denied, 454 U.S. 1153 (1982).

preclude the federal courts, however, from considering a claim that the guidelines for exercising discretion, as promulgated and applied, violate the intent and directives of "the Parole Act. "Such an inquiry into the legality of agency action, as opposed to its appropriateness within legal bounds, is uniquely appropriate for judicial determination." Garcia v. Neagle, 660 F.2d 983, 988 (4th Cir. 1981) (quoting Scanwell Laboratories, Inc. v. Schaeffer, 424 F.2d 859, 875 (D.C. Cir. 1970). cert. denied, 454 U.S. 1153 (1982); see 5 U.S.C. §706 (1976). If, therefore, the Commission's regulations that make a "parole to a detainer" a form of "parole" are outside the statutory mandate granted to the Parole Commission by Congress in the Parole Act, then the regulations are invalid, and the Commission may not deny Garafola credit for the time he served in state prison. The district court in effect found that the

Commission's regulations equating "parole to a detainer" with "parole" violated the statutory mandate of the Parole Act.<sup>7</sup> This determination is in turn subject to review by this court for error of law, Garcia, 660 F.2d at 989.

The district court pointed to three factors that persuaded it that the Parole Commission's regulations treating a "parole to a detainer" as a "parolee" exceeded the Commission's statutory mandate. First, the

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7. The district court's opinion is actually not clear as to what standard of review it applied, or indeed, as to what the precise rationale for its holding was. To the extent that the district court's opinion is bottomed on the notion that Garafola was "transferred" and not "paroled" to state prison, we note our disagreement. Exclusive authority to designate the place of confinement for a federal prisoner and to administer transfers is vested by statute in the Attorney General, through the Bureau of Prisons. 18 U.S.C. §4082 (1976). Yet Garafola was released to the detainer not by the Bureau of Prisons or the Attorney General, but by action of the Parole Commission, which has exclusive statutory authority to grant paroles but no authority to make transfers. See Clay v. Henderson,

court stated its view that "parole" necessarily requires release to the community, not to another prison authority.

Release to a detainer is not, however, an ordinary circumstance of "parole." Indeed calling such release "parole" is pure hyperbole and a gross twisting of the concept. Release on parole usually results in termination of the prisoner's period of incarceration. The parolee lives in a community or other less intrusive setting under supervision of appropriate authorities .... While the parolee is subject to a variety of "conditions of release" ...he has substantial freedom to adjust to the non-prison environment.

555 F.Supp. at 1004. We disagree.

Congress has charged the Parole Commission with making the determination whether a federal prisoner should be paroled. In Garafola's case the Commission applied the appropriate federal criteria and determined

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524 F.2d 921 (5th Cir. 1975), cert. denied, 425 U.S. 995 (1976) (decided under pre- 1976 Parole Act).

that he should be. In separate legislation Congress has also charged the Commission with cooperating with state authorities by honoring state detainees lodged against federal prisoners. See Interstate Agreement on Detainers Act, 18 U.S.C. Appendix (1976). In paroling Garafola to the state detainer the Parole Commission honored both of these Congressional directives. A state prison authority to which a federal prisoner has been paroled must make an entirely separate and independent judgment whether, under state criteria, the prisoner is entitled to state parole. The characterization of the federal action does not depend on actions taken by state authorities.<sup>8</sup> Where a prisoner has violated both state and federal law and is convicted by both forums, he has brought down

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8. Certainly, if a prisoner is paroled to the community and an hour later the state authorities arrest him on the street, and require him to serve out the remainder of a pending concurrent state sentence, there could be no doubt that the federal action was

upon himself the possibility of being paroled from federal prison to state prison; and there is nothing about a "parole to a state detainer" that inherently contradicts the notion of "parole". Moreover, in most cases, federal prisoners who find themselves subject to a state concurrent sentence will prefer a regime in which they can legitimately be paroled to a state detainer; a rule to the contrary would compel federal authorities to deny parole until termination of the state's concurrent sentence and thus eliminate the possibility of a shorter overall period of incarceration that might otherwise flow from

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a parole. We are unable to conceive, and counsel for the appellee was unable at oral argument to suggest, any principled distinction between this hypothetical and Garafola's case. The mere fact that the federal and state authorities, motivated by considerations of comity, cooperate with each other through the detainer mechanism -- thereby eliminating the hour of "street time" and the consequent administrative burden of recapturing paroled prisoners -- is not sufficient to make the federal action not a parole.

federal parole followed by state parole. See  
Clay v. Henderson, 524 F.2d 921, 924 (5th  
Cir. 1975), cert. denied, 425 U.S. 995 (1976)  
(decided under pre- 1976 Parole Act).

The second factor relied on by the district court is that the Parole Commission's own regulations place certain restrictions on a parolee that are inconsistent with incarceration in state prison. For example, one of the express conditions of release is that a parolee shall not "associate with persons who have a criminal record," 28 C.F.R. §240(a)(10) (1982). But, by paroling Garafola to the New Jersey detainer, the Commission obviously suspended this regulation and gave its permission for Garafola to associate with other prisoners to the extent required by his state sentence. See 18 U.S.c. §4203(b) (1976) ("The Commission, by majority vote, and pursuant to the procedures set out in this chapter, shall have the power to ...

impose reasonable conditions on an order granting parole...."); see also Arciniega v. Freeman, 404 U.S. 4 (1971).

Finally, the district court pointed to the fact that, if a prisoner is paroled to a state detainer under section 2.32(a)(1) of the Commission's regulations, once that detainer is withdrawn the prisoner is required to be returned to federal prison and is not to be released unless and until the Commission makes a new order of parole. 28 C.F.R. §2.32(a)(1) (1982).<sup>9</sup> The district court reasoned that, where the existence of a state detainer is one factor in favor of federal parole, and where withdrawal of that

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9. The regulation states:

- (1) Parole to the actual physical custody of the detaining authorities only. In this event, release is not to be effected except to the detainer. When such a detainer is withdrawn, the prisoner is not to be released unless and until the Commission makes a new order of parole.

detainer results not in release to the community, but rather in automatic reincarceration in federal prison and reconsideration of the parole question de novo, the Parole Commission must credit the prisoner with the time spent in the state prison towards satisfaction of his federal sentence.

Whatever the merits of this argument, it is not relevant here. On this appeal both Garafola and the Parole Commission agree that Garafola was not paroled under 28 C.F.R. §2.32(a)(1) (1982), but under 28 C.F.R. §2.32(a)(2) (1982).<sup>10</sup> Under this latter section the prisoner is paroled to the state

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10. The regulation states:

(2) Parole to the actual physical custody of the detaining authorities or an approved plan. In this event, release is to be effected regardless of whether the detaining officials take the prisoner into custody, providing there is an acceptable plan for community supervision.

detainer, but once the detainer is withdrawn,  
the prisoner is paroled to the community.<sup>11</sup>  
Thus there was an actual and binding  
determination by the Parole Commission to  
parole Garafola from federal prison.

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11. Garafola was paroled "effective August 19, 1976 to the actual physical custody of the New Jersey authorities; however, if the detainer is withdrawn, parole effective September 7, 1976 via Community Treatment Center." Notice of Action of Parole Commission, at 1 (June 17, 1976).

If the Parole Commission had timely informed the district court that Garafola's parole was pursuant to § 2.32(a)(2) instead of § 2.32(a)(1), we doubt that the district court would have ordered the Commission to credit Garafola with the time he spent in state prison. Indeed, if Garafola had in fact been paroled pursuant to § 2.32(a)(1), it would present a very different case than a parole pursuant to § 2.32(a)(2). Under a § 2.32(a)(2) parole, the prisoner is not subject to a reincarceration in federal prison unless he violates a condition of his parole.

In sum, we hold that the parole of a federal prisoner to a state detainer pursuant to 28 C.F.R. §2.32(a)(2) (1982) is in all respects a "parole" within the meaning of the Parole Act. None of the factors cited by the district court impel the conclusion that the Parole Commission's regulations are outside the statutory mandate of the Parole Act; nor can we think of any other reason why they might be invalid. We therefore conclude that these regulations are within the province of the Parole Act and that they are valid. Thus, upon revocation of Garafola's federal parole because of the subsequent state conviction, he was liable to serve the full amount of time remaining on his federal sentence on the date he was paroled from federal prison (i.e., 1452 days). The

judgment of the district court will therefore  
be reversed.

A True Copy:

Teste:

Clerk of the United States Court of  
Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 83-3175

GARAFOLA, ANTHONY J.

vs.

WILKINSON, G. C., Warden

G. C. Wilkinson, Appellant

(D.C. Civil No. 82-977)

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA  
Scranton

\* Present: ALDISERT and BECKER, Circuit  
Judges, and COHILL, District Judge\*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel September 29, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered February 2, 1983, as amended by Order entered

March 3, 1983, be, and the same is hereby reversed. Costs taxes against appellee.

ATTEST:

Clerk

Clerk

November 15, 1983

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\* Honorable Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.

Certified as a true copy and issued in lieu of a formal mandate on December 19, 1983.

Test:

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 83-3175

Anthony J. Garafola,

Appellee

v.

G.C. Wilkinson, Warden

G. C. Wilkinson,

Appellant

SUR PETITION FOR REHEARING

Present:

SEITZ, Chief Judge ALDISFRT, ADAMS  
GIBSONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM,  
SLOVITER and BECKER, Circuit Judges and  
COHILL, District Judge\*

The petition for rehearing filed by  
Anthony J. Garafola, appellee,

in the above-entitled case having been  
submitted to the judges who participated in  
the decision of this court and to all the  
other available circuit judges of the circuit  
in regular active service, and no judge who  
concurred in the decision having asked for

rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

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Judge

Dated: December 9, 1983

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\*Hon. Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.